EDITOR'S NOTE

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

MAY TERM, 1988

CECIL G. HARRIS,

Petitioner,

VS.

REFINERS TRANSPORT & TERMINAL CORPORATION, and

LOCAL UNION 20, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and

WILLIAM LICHTENWALD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. In a Section 301 action when the plaintiff claims wrongful discharge by the employer, in violation of the Collective Bargaining Agreement, and further the Union with unfair representation is the employer, when moving for Summary Judgment, under a duty under Celotex Corp. v. Catrett, 477 U.S. 317 (1986) to point out that there is an absence of evidence supporting the plaintiff's claim by going further than merely providing the bald, non-specific Affidavit of its local manager that plaintiff was discharged upon plaintiff's "cumulative work record," and to show facts constituting grounds for a discharge, and/or factor showing fair representation?

2. In a wrongful discharge grievance arbitration by a panel of Union and employer members who were both opposed to a particular Union dissident group, does unnecessary mention by the Union Business Representative that the grievant was a member of this Union dissident group, followed by an adverse change in the com-

plexion and attitude of the Union-Employer Panel, constitutes evidence of unfair representation, where there is evidence the Business Representative had been required not to make mention of the grievant's involvement with the union dissident group, and that there were additional evidence of hostility between the Local and Business Representative and the Grievant?

3. In a Section 301 action where the plaintiff offers by sworn Answers to Interrogatories, evidences of hostility by his local Union and Business Representative in that plaintiff had been in a physical altercation with his Business Representative, had "shown his Business Representative up" in winning a prior grievance where the Business Representative had said nothing could be done, had filed various grievances and complaints against his Local and Business Representative, and had been criticized and humiliated by the Business Representative at local meetings, and as a member of a Union dissident group, had asked the Business Representative not to disclose the same to the Union-Employer panel who opposed the dissident group and were

and were arbitrating his discharge grievances, and the Business Representative unnecessarily discloses plaintiff's membership in such dissident group, and thereupon the attitude of the Panel immediately turns against plaintiff, does such evidence constittute

1) unfair representation by the Business Agent and local Union?;

2) A cause for action under the Labor Managemetn Reporting and Disclosure Act?

4. In an action for wrongful discharge claiming violation of the Collective Bargaining Agreement by the employer and violation by the Union of unfair representation in the so-called 301 action, and of violation of the Union of the Landnum-Griffith Act, Article 29, U.S.C. 412 et seq., alleging disloyal treatment by the Union and Business Representative, should the District Court dismiss the action when the Answers to Interrogatories and the Complaint show a valid cause of action; and if not, should the trial court, after dismissal with leave to file anAmended Com-

occuring, allow plaintiff on filing a motion under Rule 59(e) to amend the judgment, and a timely Motion to File an Amended Complaint, vacate any judgments or dismissal and allow the post-judgment motions to file an Amended Complaint and to vacate the prior judgment?

5. In an action under Section 301 for wrongful discharge against the employer for violation of the Collective Bargaining Agreement and against the Union for unfair representation and also against the Union and Business Representative for violation of the Landrum-Griffith Act, Article 29, U.S.C.S. 412, et seq., is a party entitled to a jury trial?

6. In a Section 301 action against the employer for breach of the Collective Bargaining Agreement, and against the Union for unfair representation in the grievance procedure, do the duties upon the Union include:

A. Not to do any act which may to others involved in the grievance decision making process, indicate that the Union and/or any key Union agents are hostile to the grievant;

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B. To know, investigate, and argue, with sincerity, honesty, and reasonable vigor, the basic factual and contractual points and issues supporting and opposing the grievant;

C. To discuss the weak and strong points of the cases of the grievant and employer;

and may a Union be guilty of unfair representation, although there is no evidence of intentional wrong doing?

7. In an action for wrongful discharge against the employer for breach of the Collective Bargaining Agreement, and against the Union for unfair representative and violation of the Landrum-Griffith Act, Title 29, Section 412, et seq., where, after the plaintiff has responded to the employer's Motion for Summary Judgment only by filing Answers to the Union's Interrogatories, and also failed through inadvertance to file an Amended Complaint on the Landrum-Griffith Action, should the trial court render Summary Judgment and dismiss the action, if plaintiff's Complaint and/or his Answers to Interrogatories, show a potential cause and/or causes of action;a nd further, should the trial

court, on plaintiffs' Post Trial Motions under Rule 59(e), 60(b), and for leave to file an Amended Complaint, allow the same where the post-judgment evidentiary filings and the proposed Amended Complaint show proper questions of fact for trial?

8. Is each federal court which has determined that a moving party is entitled to Summary Judgment, under a duty to discuss in substantial detail the evidence offered by the party moved against, so as to show such claimed evidences are merely "conclusory" and do not constitute evidences of material questions of fact properly to be determined by trial?

P.6

REFERENCE TO UNOFFICIAL REPORTS OF DECISIONS BELOW

This Counsel is not aware of any Official Reports of the Decisions by the Courts below.

The Decision and Opinion of the United States Court of Appeals, For the Sixth Circuit, filed December 22, 1987, appears in the Appendix at page 1.

The Decision and Opinion of the United States District Court, Northern District of Ohio, Western Division, which granted Summary Judgment for Defendants on March 31, 1986 appears in the Appendix at page _____. Also in the Appendix at page _____ in the District Court's Opinion and Order of September 5, 1986, by which the District Court overruled Petitioner Harris' Motions for a New Trial; To Alter and Amend the Judgment, under Rule 59(e); a Motion For Leave to File

An Amended Complaint; a Motion to

Vacate the Judgment under Rule 60 (B).

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STATEMENT OF GROUNDS ON WHICH JURISDICTION OF UNITED STATES SUPREME COURT'S INVOKED

Under Rule 21, 1 (e) the Jurisdiction of the Supreme Court is invoked by reason of the Judgment of the United States Court of Appeals for the Sixth Circuit on December 22, 1987; and the timely filing on January 5, 1988 of a Motion for An Extension to January 11, 1988 for filing a Petition for Rehearing, which was timely filed on or before January, 1988. Therefore, on March 1, 1988 the said Sixth Circuit Court of Appeals denied our Petition for Rehearing; and this Appeal is timely filed accordingly on Tuesday, May 31, 1988.

Statutory authority for this Supreme Court to review the said Judgment of the United States Court of Appeals for the Sixth Circuit is found in part in Title 28, Section 1254, Supreme Court - Jurisdiction, which in parts here material reads:

"§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

P. 10

STATUTES INVOLVED

Rule 21 .1 (f) this case involves the rights given by the Labor-Management Act, Title 29 USC Section 158 which in parts here beleived to be material reads:

"§158. Unfair labor practices

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USCS §157];

(2) to dominate or interfere with the information or administration of any labor organization to contribute financial or other support to it; Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [29 USCS §156], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That

nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act [this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later,..."

And as to duties on Labor Organization

Title 29, USCS, Section 158, (b), which

in parts here material reads:

"(b) Unfair labor practices by labor organization. It shall be an unfair labor practice for a labor organization or its agents --

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [29 USCS §157]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against

an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

Also involved is the Labor Management Reporting and Disclosure Act, Title 29, Section 157, which reads:

"§157. Rights of employees

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refraim from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 USCS §158 (a)(3)].

(July 5, 1953, c. 372, §7, 49 Stat. 452; June 23, 1947, c. 120, Title I, §101 in part, 61 Stat. 140.)"

STATEMENT OF THE CASE

Plaintiff alleges two causes of action - one a Title 29 U.S.C.S. Section 301, action for wrongful discharge by Refiners Transport & Terminal Corporation, hereinafter referred to as "Refiners", and for unfair representation by Local Union No. 20, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as Local 20.

Plaintiff's second cause for action is for violations by Local 20, and Business Representative William Lichtenwald, of the Landrum-Griffin Act, Labor-Management Reporting and Disclosure Act, 29 U.S.C. 401 et seq.; in that these Union Defendants unlawfully denied Mr. Harris the right to speak at Union meetings and to exercise other Federally protected rights in his dealings with Refiners and Teamsters, and, above all, that Local 20, and Lichtenwald, conspired and worked in agreement with Refiners to cause Mr. Harris

a veritable "thorn in their side" to be permanetntly fired, and thus to be expelled as a member; the ultimate discipline. Jurisdiction was claimed in the United States District Court in Toledo, Ohio, where the parties were and Plaintiff was employed, under the Labor-Management Relations Act, Title 29 U.S.C.S., Section 185, under the Labor-Management Reporting and Disclosure Act, Title 29 U.S.C.S. Section 412; and Title 28 U.S.C.S. Section 1337.

Plaintiff in his complaint alleged that Refiners' written instructions, and the U.S. Department of Transportation Rules, required him to stay in constant sight, of the values, intake and other key parts involved in loading and unloading molten sulphur and sulphuric acid - hazardous chemicals - and within 25 feet of the same. Refiners, through their terminal manager Raymond Middleton

repeatedly orally asked Mr. Harris to violate the Refiners' written orders and the Department of Transportation orders, by orally directing Mr. Harris to take his eyes off the crucial and dangerous processes of loading and unloading, and during the same to do "paperword" at the customers places, although these customers themselves gave orders like the Department of Transportation to keep a constant eye on the key and crucial parts like hoses, valves, tanks, and the like. Mr. Middleton was presumably trying to lower Refiners' costs, and thus increase Mr. Middleton's bonus.

Mr. Harris also alleged that Mr. Harris told Mr. Middleton that Mr. Harris would do whatever Mr. Middleton ordered him to do, as long as Mr. Middleton put his orders and instructions in writing. But Mr. Middleton

wouldn't do that. Mr. Harris also alleged and claimed that Refiners and Local 20 wanted him fired, and took steps together to that end, because Mr. Harris stood up for his Union and Contract rights, wanted to be paid for all time worked, not giving Refiners' any "free time" - a point which actually was the decisive key with Mr. Middleton as other drivers would give Refiners some 30 minutes "free" at the end of the work day.

Mr. Harris also alleged that Mr. Harris told Mr. Lichtenwald not to mention at any time during the Grievance Procedure that Mr. Harris was a member of Teamsters for a Democratic Union, an independent organization of Teamster members who criticized National Teamster President Jackie Presser, and Local 20 President Harold Leu; and the Toledo TDU opposed Mr. Leu

in his races every three years to be elected President of Local 20; and Mr. Harris had also filed grievances against Mr. Leu, Local 20, and Business Representative Lichtenwald.

Mr. Harris alleged also that Mr. Lichtenwald, his Business Representative who purportedly was representing him, despite Mr. Harris orders to the contrary, disloyally brought out at the so-called arbitration stage of Mr. Harris discharge grievance in Columbus before the Ohio Joint State Grievance Committee that Mr. Harris was a member of TDU, and Mr. Harris alleged that this changed immediately once the entire complexion of the arbitration hearing, and that immediately once that that TDU disclosure was made, that Mr. Harris "Goose was Cooked" as Mr. Lichtenwald knew ahead of time would happen, and as Mr. Lichtenwald intended. This was the

final and deadly disloyal and hostile act, although there were others.

Both Refiners and Local 20 and Defendant Lichtenwald were charged with proximately causing Mr. Harris' discharge and the resulting losses and humiliation. Refiners claimed Mr. Harris had "stole time" from them, by not filling out various forms while loading and unloading hazardous and dangerous materials.

The Union Defendants filed Interrogatories to the Plaintiff, and Request For Production of Documents, on March 5, 1985, and Plaintiff filed on May 22, 1985 Plaintiff's Answers to Union Interrogatories and Request for Production of Documents.

On January 30, 1985, the Union moved for Partial Summary Judgment as to Defendant William Lichtenwald, in both the 301 Action and the Landrum - Griffin Act violation, and also to

strike the Jury Demand, and this relief was granted on April 8, 1985, despite Plaintiff's Memorandum Opposing the Same. As to the Landrum-Griffin cause of action, Petitioner was given leave to file an Amended Complaint, but although intending to do so, Plaintiff's Counsel failed so to do through oversight.

Within the time allowed, Refiners, alone, moved for Summary Judgment on June 7, 1985. On June 17, Plaintiff's Motion for 60 days to respond to Refiners' Motion for Summary Judgment was granted. Despite intending to prepare a further response, Plaintiff's Counsel overlooked the same, and no further responses were filed before Judgment was ultimately rendered for Defendants-Respondents.

On June 11, 1986 a Notice of Deposition was filed, but Defendants at the scheduled deposition merely had

Plaintiff to identify the various documents which he had brought pursuant to Notice.

Defendant Refiner's Motion for Summary Judgment or, in the alternative, Motion to Dismiss filed June 7, 1985 was based on three grounds:

"1. Plaintiff's Section 301 claims are barred by the statute of limitations applicable to such claims as set forth in the Supreme Court's decision in Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983).

2. Plaintiff's Section 301 allegations fail to state a claim upon which relief can be granted because Plaintiff has failed to adequately allege a breach of the Union's duty of fair representation.

3. Plaintiff's Section 301 allegations fail to state a claim upon which relief can be granted because

Plaintiff has failed to allege exhaustion of internal union remedies or an excuse for failure to do so."

On March 31, 1986 the District Court by Judgment Entry and Opinion and Order, granted Refiners Motion, on Summary Judgment. The District Court ruled that the Action was timely filed on Refiners, citing the Sixth Circuit's ruling in Mason v. Continental Baking Co., 779 F.2d 1166 (6th Cir. 1985), but ruled that in effect the Complaint and Plaintiffs Answers to Interrogatories were insufficient, the District Court stating in part at page 5:

> "The Plaintiff alleges that his membership in the Teamsters for a Democratic Union was brought out during the grievance procedure and as a result Plaintiff was not represented by the union in a fair, loyal and good faith manner. The only support for these allegations are contained in plaintiff's answers to defendant's interrogatories and request to produce documents. Contained therein are plaintiff's conclusory and unsupported statements with

regard to union actions. Upon an examination of the relevant paragraphs of the complaint as well as the remainder of the record, the Court fails to find facts to support plaintiff's allegations that the union acted in a manner which was arbitrary, capricious or in bad faith...."

The District Court then Dismissed the Actions and rendered Judgment for Refiners and Local 20 on March 31, 1986.

Plaintiff then served Defendants on April 10, 1986, and filed on April 11, 1986, his "Motion for New Trial; To Reconsider, Vacate Dismissal, and Reinstate; and Under Rule 59(e) To Alter or Amend Judgment." This Motion was supported by the Affidavit of Mr. Harris together with several enclosures by him.

Thereafter, and within 30 days of the Judgment of Dismissal of March 30, 1986, this Counsel filed on April 30, 1986 a "Motion for Leave to file an Amended Complaint; Vacation of Judgment,

Rule 60 (B); Other Relief," supported by an additional Affidavit from Mr. Harris, an affidavit from Ron Cannon, a Refiners Steward, an Affidavit from Konstantine Petros, a Local 20 Steward then at Roadway Express in Toledo, offering an expert opinion on the adverse and deadly effect of Mr. Lichtenwald's mentioning that Mr. Harris was a member of TDU, and how that would prejudice any chances Mr. Harris had, because the Union and Company members of the Joint State Committee in Columbus would thereby be prejudiced against Mr. Harris, and that such mention of TDU would be a "Kiss of Death" to Mr. Harris grievance, and also the Affidavit of this Counsel as to a conference with Mr. James Warren, Refiners' Steward, who refused to give an Affidavit or statement, and as to certain documents.

Plaintiff-Appellant Harris timely filed a Notice of Appeal on April 30, 1986, and the U.S. Sixth Circuit Court in that Appeal, 86-3396 on August 13, 1986 dismissed the same on the ground that it was premature.

Both the Union and Refiners' filed responses to Plaintiffs' two Motions, and Plaintiff filed reply memorandums. Defendants claimed no cause for action was alleged or shown, no proof of a failure to represent in good faith, and no violation of the Landrum Griffin Act. Plaintiff claimed that his Motion to Amend should have been granted because the only real point offered in opposition was delay, and delay itself was not sufficient, unless Defendants could show real prejudice, and no prejudice was offered by either Defendant. The Trial Court denied all 4 Motions, holding the Preferred Amended Complaint and

and added evendtiary affidavits, did not materially nor substantively add to the prior Complaint nor Answers to Interrogatories. We claim that the District Court was under a duty, even after Summary Judgment, to allow the filing of an Amended Complaint, because it clearly alleged causes for action and also to set aside the Summary Judgments because Petitioner had presented evidences entitling him to a Trial on the merits. All actions, absent perjudice to a party, should be decided on the merits. The defenses offered here are technical, and really nothing more.

Actually, Plaintiff-Appellant Harris had sufficient in the record to withstand the Refiners' Motion for Summary Judgment or to Dismiss. If Plaintiff had filed his additional Affidavits, and Amended Complaint before, the same would have been

considered and allowed. So though filed later they should be treated the same way. The additional time taken of the District Judge does not properly call for a deserving party to be thrown out of Court.

Every attorney at times makes mistakes. Our Courts should give priority to doing Justice. Sanctions could have been put on Petitioner's Counsel. So Justice would have been better served.

The District Court overruled all of Plaintiff's Motions on September 5, 1986, and Plaintiff-Appellant duly filed his Notice of Appeal on October 3, 1986 from the prior Orders and Judgments of March 31, 1986, and September 5, 1986.

The Appeal to the United States Sixth Circuit Court of Appeals was duly processed, and after that Court

of Appeals affirmed on December 22, 1987 the District Court's Judgment, Petitioner timely sought and secured an extension of time for filing a Petition for Rehearing, and duly and timely filed the same. Then on March 1, 1988, the Sixth Circuit Court of Appeals denied Petitioner's Petition for a Rehearing; and now our Petition For a Writ of Certiorari is timely filed on May 31, 1988. In affirming, the Court of Appeals also spoke of Petitioner's "conclusory" allegations and Answers to Interrogatories and Affidavits. In the Appendix herein are copies of the body of the Complaint.

B. FACTS

Inasmuch as each Court below has termed our allegations and evidentiary filings "conclusory", Petitioner here will attempt to refer to specific parts of the Record which bear out our factual claims.

First of all, Petitioner Harris was fired because he followed U.S. Department of Transportation and Refiners' Rules that he should constantly observe the loading and unloading of dangerous molten sulphur and sulphuric acid. Primarily we shall quote from Plaintiffs' Answers to Union Interrogatories, and Request To Produce Documents, filed May 22, 1985, and herein after referred to as "Ans. To Inter.".

Petitioner Harris hauled a lot of Molten Sulphur, which is unloaded at 258° Fahrenheit, (Ans. to Int. P. 3E) and "Ans. To Int. 10, P. 10" reads in parts:

"I have had this Molten Sulphur to catch on fire and ignite from no more than the heat it built up in the unloading line. This has happened to me personally one time. I took steps to prevent this from happening again. Also I have had these trailers to Gusher Molten Sulphur out the top of the trailers loading Dome, when the Loading Dome was opened to unload this product."

"Other drivers have had the unloading hoses just literally blow apart while unloading Molten Sulphur."

Petitioner was instructed, as sworn to in his Ans. To Inter. as follows:

"During my training period when beginning to work for Refiners Transport and Terminal Corp., hereinafter referred to as RTTC, which lasted as I recall 4 days, I was told to stay within reach of the loading and unloading valves, so that in case anything went wrong; everything could be shut down in a minimum amount of time. My Trainer was James Warren. Also I was told by Mr. Warren during this training period that under no circumstances do you sit in the cab of your truck during loading and unloading of your trailer. Not even if it is raining."

"Also: Drivers Pocket Guide to Hazardous Materials, Issued March 1981, Distributed by Refiners Transport and Terminal Corp. "Pages 42 & 43 Article Attending Vehicles."

Text: "A person qualified to attend the vehicle during loading and/or unloading must be: Awake, within 25 feet of the vehicle, with an unobstructed view of it, aware of the nature of the Hazardous Material in question, Instructed in emergency procedures, authorized to and capable of moving the vehicle if necessary."

At page 3c, where Refiners' Terminal Manager verbally ordered Petitioner Harris to violate the rules, but refused to put the verbal order in writing, and this quotation states also the real reason Refiners' discharged Petitioner; and reads:

"The Shippers have signs up on their loading racks, saying that drivers must remain with their trucks during the loading and/or unloading their trucks. Guards at these plants check and see if the drivers are doing what they are supposed to be doing (observing the shippers Safety Rules), also the supervisory personnel of these Shippers are around and watching. The Customers or Receivers of this Molten Sulphur have the same type signs up for unloading Molten Sulphur. The Shipper and Customers or Receivers Safety Precuations, Forbid the Driver to be in the Cab of the tractor, and the instructions and orders of the shippers and customers were, and are, the same as the RTTC's.

"Stay with your truck during loading and unloading." What the Shippers and Customers or Receivers Safety Rules mean and have verbally said, is that I as a Driver must not at any time during Loading and Unloading be in the cab nor may I do any book work during Loading and unloading. Because I am ordered at all time sto be looking at the valves, hose or hoses, dome opening in Tanker, customer or shippers fittings, customers tank gauge or height of customers storage pit and signs of overflow of pit or storage tank. There is no place on top of the truck, nor upon a loading or unloading rack to make out paper work. I told Middleton this. His reply, Quote "Do it in the cab, a shantic, on a fender or in the street" Unquote. I told him, I could not do this, unless he put it in writing. Middleton said he could not do this. I told him, It's unsafe; and I needed protection from the Shipper, Customer or Receiver and from him if anything went wrong during loading and unloading, while I was making out the paperwork. Middleton said he can not put do's and don'ts in writing.

The Shippers and Customers or Receivers would notify the Company (RTTC) if a driver did not stay with his unit, or did not stay in the cab of the tractor or somewhere else; "Stay with his unit." meaning being within reach of the Loading and unloading valves."

Petitioner Harris' Union Steward, Mr.

James Warren and Local 20 knew Petitioner

asked Refiners to put their Instructions in writing, and Petitioner answered Interrogatory 6 on this Point, at page 25:

"ANSWER:

Yes. Notes, written and kept by plaintiff during grievances hearings by Company, Union Local 20 and union Stewart."

The best official citation to the Department of Transportation Rules is from Ques. To Inter. P. 9A:

"(G) Answer:

Code of Federal Regulations
Transportation
Title 49
Parts 100 to 177
Revised as of October 1, 1982
Chapter 1 Research and Special,
Programs,
Programs Administration,
Department of Transportation.
(Parts 100-177)
Editorial Note: For a document which shows editorial changes and corrections in this chapter, see 35 FR 13835, September 1, 1970.
Subpart B - Loading & Unloading
177.834 General Requirements
Title 94
Title 46 Article 33 Shipping."

Petitioner by standing up for true Unionism as he saw it, suffered from hostile

and discriminatory practice by Refiners', Local 20, and Business Representative Lichtenwald, for varying reasons, including a physical attack on Lichtenwald in December, 1982; filing of Grievances against Lichtenwald, Local 20, and Petitioner's continued insistence that Local 20 and Refiners abide by the Collective Bargaining Agreement. Petitioner was a member of Teamsters for a Democratic dissident group which in Ohio opposed Teamsters President Presser and Local 20 President Harold Leu, when Petitioner's Grievances came on for hearing at the realistic final arbitration stage, before the Ohio Joint State Grievance Committee, Business Representative Lichtenwald, maliciously to assure Petitioner Harris would be discharged, although Mr. Harris had asked Business Representative Lichtenwald not to do it, mentioned Mr. Harris was a member of

TDU. Since TDU is unpopular with the Teamsters and Employers both, Mr. Harris "Goose was Cooked", and under the circumstances Local 20 and Business Representative could have done nothing as lethal and hostile to Mr. Harris than to mention this because TDU was an anathema to Teamsters and Employers. This in part is brought out by Petitioner's Answer to Union Interrogatory No. 9, which at Page 44 reads:

> "Interrogatory No. 9: With reference to the allegations contained in ¶ No. 10 of the Plaintiff's Complaint that, "At the hearing, Defendant Lichtenwald, knowing that his actions would contribute to Plaintiff being fired, deliberately and knowlingly brought out that Plaintiff had been a member of the Teamsters for a Democratic Union. Immediately, the complection (sic) of the hearing changed, it was then obvious that Plaintiff would be discharged," state:
>
> True. Because he basically and wholeheartedly did not want to represent me in this case or any other case I might be involved in. This statement could be corroberated by other drivers of R.T.T.C., Matlack Corp. and Coastal Tank Lines; because of Lichtenwald's

hostile behavior and attitude toward me during general monthly held Union meetings. These people would have to be forced to come forward to testify. For they (other employee's and union local 20 members) are in fear of retaliation by the Union and their respective employers and causing them to lose their jobs."

And at Page 44A:

"Ron Cannon Union Stewart for Terminal 11 began speaking about what the Co. (RTTC) had been doing and why. I raised my hand and got the floor and I told Cannon that he did not know what he was talking about. Then I gave my explanation of Refiners parent Co. Leaseway's size and told him and everyone else that was their way Leaseway did during the Wage Concession Meetings and Votes and Cannon called me a liar. This statement infuriated me totally and a small Altercation started. Lichtenwald got involved in it when someone grabbed me from behind. I did not know who it was and down he went. I don't know what took place from the time that I was grabbed from behind nor do I know how long (amount of time) this Altercation lasted. But within 2 1/2 months from this meeting and altercation, all the trouble started with the paperwork, work habits and check in and fueling of the truck. Up until this time nothing was ever said if there really was anything wrong."

P. 36

And at Page 44B:

> "I filed grievances or rebuttals on all of their Kevin & Raymond's) actions and possibly the earliest that the Union acted on this was September 16, 1983. Lichtenwald displayed his intentional direct contempt and disloyalty to me as a Loyal Teamster, Dues Paying and in good standing. Lichtenwald also displayed his unwillingness to Nip the Co's. harrassment of me in the Bud. In my personal opinion, he just played along and along and along and never had any intentions of stopping the co. (RTTC) from harrassing me. (Cecil Harris). Thus relating to the co's. (RTTC) ability to possibly discharge me, as did take place January 5 and January 10, 1984. Also this behavior by Lichtenwald was in my best opinion a Direct Retalliation to the Altercation at Royal Inn Motel December 19, 1982 and my involvement with T.D.U."

There was no occassion for Business Representative Lichtenwald to bring out Mr. Harris involvement with TDU, as shown by Ans. To. Inter. at page 61:

> "Mr. Lichtenwald's disinterest, unconcerned attitude toward handling of my grievances at the local level. Also I personally requested of him not to read the

grievance in Columbus containing my T.D.U. membership. I even asked Mr. Warren to ask Mr. Lictenwald not to read it, because Mr. Warren and Mr. Lichtenwald are good friends. But it made no difference. There were plenty of other grievances on the same thing that he could have read. Just like Mr. Warren told me, Quote "I think they determine these grievances before we even get into the hearing." Unquote: Notes dated 12/13/83."

And at page 67:

"In 1983 some months before my un-called for discharge on or about January 5, 1984 Lichtenwald would even bring up my membership in T.D.U. in Regular Monthly union meetings, to bring up embarrassment and humilitation of me in front of members of the union. On several occassions both in the latter half of 1982, and also in 1983, I told Lichtenwald to keep my T.D.U. Membership out of Local 20's meetings. I told Mr. Lichtenwald because I don't bring T.D.U. in here (Meaning Local 20 Union Hall) so I don't expect you (Lichtenwald) to bring it in. What organizations I belong to is my business and not the business of Teamsters or RTTC. the only reason that I mentioned my T.D.U. membership in the grievance to start with was that RTTC and Union Local 20 already knew that I was handing out TDU Literature and I was just confirming their beliefs.

Also practically none of the grievances that I had filed with Teamsters Local 20 during my 11 years involvement with

RTTC have never been completely heard fully. 99% Ninety Nine Percent were written in the last 2 years I was there at RTTC. So I don't believe that I could beconsidered a long time troublemaker or whatever. I was only trying to get the Union to uphold the Text of our Contract between RTTC and Local 20 and the Local Union was fighting me all the way. The very fact that practically none of these grievances were properly and fully heard substantiates this fact."

And at page 67A:

"Local 20 and Lichtenwald in 1982, 1982, and 1984, knowingly concealed from me information on Okuly's Grievance, which the Union's Chicago Tribunal Committee had ordered in 1982 Local 20 and Lichtenwald to give to me.

I, also filed grievances against James Warren, (1) Un-Union Like Behavior, which the Local 20 Executive Board White Washed down the drawin supposedly for lack of evidence. The evidence was there but he Warren was Lichtenwald's hand picked, (Not Voted in by employees of Terminal 91), Union Steward for our barn (Terminal). I filed against Warren & Lichtenwald for hand-picking Warren."

And at page 67B:

"I filed negligence charges against the Co. as well as Local 20 and Lichtenwald in these grievances."

And at page 67C:

"(A fellow driver, of RTTC was discharged by R.T.T.C. (fired because he just stopped in to say Hi, to some

the Office Employees, and he had a can of beer in his hands, he was definitely off duty at the time and the co. fired him. I asked Lichtenwald what he and the Union was going to do to get the man's job back, Lichtenwald replied, "their's not any thing I or the Union can do, about it. I told Lichtenwald that in no way should their man not be reinstrated. The man was not on duty at the time and that all the co. should of done was tell him, to please not come on the property with alcholol. The man did get his job back, but if I would of not, (as saying, goes) stuck my nose in, Lichtenwald and the Union would of sold a man right down the river, they wouldn't of even fought for him."

And at page 67D:

"The Union and the Co. figures me to be a trouble maker, by fighting for what I believe is right, for myself and for anybody else who is being done wrong, by. Even though I told the man I didn't like him, I would help to keep him from being unjustly and unfaithfully dealth with by Union and Co. then they the co. (RTTC). If you do not play ball with the Union and Co. then they work together to get rid of you. This is fact.)"

Responsent and Local 20 will claim that Terminal Manager's Affidavit, attached to Refiners' Motion for

Summary Judgment, shows Petitioner Harris was discharged for "cumulative work record", but there are no factual and evidentiary materials showing any vilations of the collective Bargaining Agreement. This is a farce and smokescreen. Petitioner Harris was fired because he abided by the Department of Transportation Rules for Safety, and because Mr. Harris wouldn't give Refiners' 1/2 hour of :free time" a day as did some of the other drivers.

Attached to Petitioner Harris' Motion for a New Trial, served within the required 10 days, was a Copy of the Ohio Bureau of Employment Services, filings, which shows that the Argument over "Free Time" was the real reason for firing, as Refiners' claimed that Mr. Harris would claim the time from when he pulled into a customers place until

he pulled out, but Refiners' claimed he wasn't entitled to all that extra time he took for doing the "Paperwork" which "Paperwork" should have been done while unloading or unloading. -- the same old controversy.

No where is there any reference in the filings by Refiners and Local 20 that Mr. Harris truned in any false filings. Mr. harris claimed Mr. Lichtenwald did not represent him fairly because Mr. Lichtenwald did not get the Refiners' records, "work sheets, drivers logs, tachograph, although Mr. Harris requested them, Aff. 9 nor that often drivers will be late for 10 minutes which is the amount of time which MR. Harris lost for Refiners;" which was stated on Page 8 of the memorandum for Petitioner's MOtion for a New Trial, filed April 11, and served, April

10, 1986. The first attachment to that Motio nfor a New Trial, etc., was an OBES "Examiner's Fact Finding Report" which reads:

> "EXAMINER'S FACT FINDING REPORT
>
> Theft and Dishonesty. January 25, 1984
>
> Refiners Transport and Terminal Corporation terminated Mr. Cecil G. Harris due to Theft and Dishonesty in connection with his employment there. The theft and dishonesty act we terminated him for was for turning in more time worked then he actually did. By accepting his paychecks, it falls under the Theft and Dishonesty of the Companys Union Contract.
>
> Raymond S. Middleton (s) (?)

Petitioner Harris had a very creditable record of saving Refiners "Big Money," when he could, including helping a Refiner's unimportant customer save a load of molten sulphur, December 24, 1983, 12 days before he was fired January 5, 1984, when Coulton Chemical Foreman Wilson, as stated in Answer to Inter. P. 3F:

> Wilson asked me to help them to keep from losing the whole trailer load of Molten Sulphur on the ground. I told Wilson one second. I shut down what I was doing and I ran to Trimmer and corrected his and Wilson's problem right away. Set truck up to unload properly, and helped Trimmer clean up the mess. Wilson wrote on Trimmers Way-Bills in the Demurrage Spot that

Also Coulton Chemical Corp. Supervisor Bob on the evening of January 24, 1983 advised me of a problem they were having with R.T.T.C. and after making 2 phone calls to RTTC Personnell and no answer, I went to the extreme and called the President of RTTC at his home. Shortly thereafter the RTTC Drivers were back on the job and Coulton Chemicals problems were solved.

I have kept more than one driver out of trouble with this product. I have been asked more than once by the Company (RTTC) to unload a Moten Sulphur trailer that no one else could get unloaded. Why? Evidently because my knowledge of the product and trailer was better than the other drivers. There is a lot of danger being imposed on anyone to be asked to unload a Molten Sulphur trailer that will not unload under normal conditions. I was the only person around when I would open one of these trailers under these conditions.

I guess, you could say that I have saved the company from probably having to buy 6 new sulphur trailers. Because if this product ever completely solidifies in the trailer it would be almost impossible to remelt it into a liquid. Because all of the heating coils are in the bottom of teh trailer. They are not wrapped up around the sides as a railroad tank car is. Thus requiring the Company (RTTC) to buy another new trailer.

The Ohio Rider to the Central States Area Tank Truck Agreement, attached to Refiners' Motion for Summary Judgment, provided in parts:

Article 21
Safety

Article 21 shall be supplemented as follows:

Article 23
Paid for Time

Section 23.2 Call-in time shall be amended as follows:

Employees called to work shall be allowed sufficient time, without pay, to get to the garage or terminal, and shall draw full pay from the time ordered to report and register in. If not put to work, employees shall be guaranteed six (6) hours' pay at the hourly rate specified in this agreement. If an employee is put to work, he shall be guaranteed eight (8) hours' pay.

Attached to Petitioner Harris' Motion for Leave to File Amended Complaint, etc., filed April 30, 1986, in Petitioner's Affidavit, which at Page 9 reads in part:

EVIDENCE OF MR. LICHTENWALD"S BAD FAITH IN KNOWING ABOUT, BUT FAILING TO MENTION THAT AT JANUARY 10, 1984 COLUMBUS HEARING, REFINERS FAILURE TO PAY MR. HARRIS FOR TIME WORKED IN ACCORDANCE WITH THE COLUMBUS JOINT COMMITTEE'S RULING OF OCTOBER 4, 1983, ARTICLE 23

On October 4, 1983, a number of grievances of Mr. Harris were heard by the Ohio State Joint State Committee which ruled that Mr. Harris was to be paid for all time worked. Previously, Refiners had refused to pay him this time, because Mr. Harris' had exceeded Company policy time. The matter was taken up with Mr. Middleton and he said he would pay it in two weeks.

Refiners and Local 20 in the Court of Appeals made numerous reference to the so-called minutes of the Ohio Joint State Grievance Committee hearing of January 10, 1984,

Harris Grievance; but, there is no required identification, authentication, nor evidentiary statement that the said so-called "Minutes" were a true, accurate, nor fair statement of what transpired at that Hearing, and Petitioner denies the same.

Therefore, the above-mentioned "Minutes" of the Ohio Joint State Grievance Committee were not legal evidence nor properly to be considered by any court herein.

For clarity, we state that Petitioner's only evidentiary filing, before Summary Judgement, was his Plaintiff's Answer to Union Interrogatories, and Request to Produce Documents, filed May 22, 1985.

Thereafter, and after the Summary Judgment of March 31, 1986, Petitioner Harris attached Affidavits to his Motion for a New Trial, etc., timely filed on April 11, 1986, and Motion for Leave to File an Amended Complaint; etc., filed April 30, 1986, which 2 filings included 2 Affidavits of Petitioner Harris, one of their counlse, an Affidavit of former Refiners Steward Ronald D. Cannon, an affidavit of Konstantine Petros, a TDU member that to mention that Mr. Harris was a member of "TDU" would be a "kiss of

death" to both Union and Employer Panel Member of the Ohio Joint State Grievance Committee. At Page 7 of Plaintiff's Motion for a New Trial, etc., Memorandum on a bit of evidence of Unfair Representation by Local 20.

P. 47

ARGUMENT

I. IN A COMPLAINT INCLUDING SECTION 30] ACTION, AND ALLEGATION OF A VIOLATION OF THE LANDRUM GRIFFITH ACT, AND UNFAIR REPRESENTATION AGAINST THE UNION, FOR WRONGFUL DISCHARGE, AN EMPLOYER, MOVING FOR SUMMARY JUDGMENT, MUST GO FURTHER UNDER CELOTEX CORP. V. CATRETT, 477 U.S. 317, THAN TO PROVIDE A BOLD, NON-SPECIFIC, AFFIDAVIT CLAIMING GROUNDS FOR DISCHARGE FOR "CUMMULATIVE WORK RECORD;" AND FAILURE SO TO DO, DOES NOT PLACE THE BURDEN OF PROOF ON THE PLAINTIFF EMPLOYEE.

After this case was on Appeal, the Opinion was announced by this Court in Celotex Corp. v. Catrett, 4]7 U.S. (1986). In the Celotex Corp case, Supra, Chief Justice Rehnquist stated, as given in 91 L. ed. 2d 265 at page 275:

> "Instead, as we have explained, the burden on the moving party may be discharged by "showing"—that is, pointing out to the

District Court—that there is an absence of evidence to support the nonmoving party's case."

In our case, Refiners, through Mr. Raymond Middleton's Affidavit, supported their motion for Summary Judgement only by the relevant statement, which reads:

4. On January 5, 1984 Refiners discharged employee Cecil Harris from his position as truck driver on the basis of his cumulative work record which included twelve (12) violations of the Uniform Rules during the previous nine (9) month period. Such discharge was not violative of the labor agreements referenced in No. 3, above. In conjunction with the discharge, a discharge hearing was also held with representatives of Teamsters Local Union No. 20 on January 5, 1984.

There are no facts given describing nor proving the Violations.

As shown previously, the real reasons for the Discharge are not spelled out.

We respectfully claim that this Court should make clear that the Employer should be required to spell out in meaningful

detail the facts constituting the Violation claimed to constitute a dischargeable offense, which in the real world is like "Capital Punishment" on a worker's employment record.

So, here there was no evidences showing Fair Representation by the Union.

P.50

II. IN AN ACTION FOR WRONGFUL DISCHARGE, AGAINST THE EMPLOYER AND AGAINST THE UNION FOR UNFAIR REPRESENTATION AND BREACH OF THE LANDRUM GRIFFITH ACTION, TITLE 29, SECTION 412, ONCE THE EMPLOYER SHOWS EVIDENCES OF HOSTILITY AND DISLOYALTY BY THE LOCAL AND BUSINESS REPRESENTATION AGAINST HIM, THE COURT SHOULD FIND THE SAME TO BE EVIDENCE OF UNFAIR REPRESENTATION AGAINST THE UNION.

We claim Petitioner Harris produced evidence that he was wrongfully discharged because Mr. Harris stood up for safety; 2) Mr. Harris demanded pay for all time worked, and would not give Refiners any "free time" nor was Mr. Harris in violation of the Collection Bargaining Agreement; 3) that Mr. Harris was not discharged for any proven violation of the Labor Contract; and 4) Mr. Harris was fired because Refiners and Local 20 wanted to get rid of Mr. Harris because he was a Teamster for a Democratic Union dissident, who was a "thorn in the side" of Refiners and Local 20.

In support that our evidence constituted evidence of Unfair Representation we cite Cunningham v. Erie Railroad

Company, 358 F.2d 640, (CA 1966).

III. IN ACTIONS BASED UPON SECTION 301 AND THE LANDRUM GRIFFITH ACT, A PARTY IS ENTITLED TO A JURY TRIAL.

There is a conflict in the circuits on this issue.

The best reasoned decision is Quinn v. Digiulian, 739 F.2d 637 (CA D.C., 1984).

IV. A PARTY IN DEFENDING AGAINST A MOTION FOR SUMMARY JUDGEMENT IS ENTITLED TO THE BENEFIT OF ALL FACTS AND CLAIMS CONTAINED IN THE PARTY'S FILINGS.

The leading case is Sherman v. Hallbauer, 455 F.2d 1236, (CA 5, 1972).

V. After the Trial Court has granted Summary Judgement and dismissed the Case, A Party by timely motion memoranda and Affidavits, submitting a Proposed Amended Complaint and Affidavits, is entitled to a Vacation of the Prior Judgement, if the facts and claims in such Post Judgement filings, extablish material issues to be determined by Trial. Firstly, we cite Foman v. Davis, 371 U.S. 178; and Hurin v. Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California, 648 F.2d 1252 (CA9, 1981).

P.53

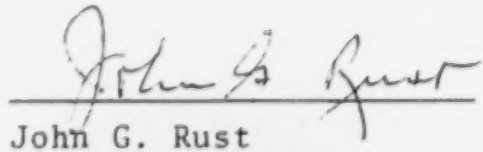
CONCLUSION

There is a need for this Honorable Court to declare the Law on the many issues in this case.

This Counsel has well selected the evidences available.

This Counsel would honor the Opportunity to appear before this distinguished Court, and would turn out a Brief in keeping with the high scholarly traditions of this Court.

Respectfully submitted,



John G. Rust
Counsel for Petitioner

R 54

JURISDICTION IN U.S. DISTRICT COURT

Jurisdiction in the United States District Court is granted by the Labor Management Act, Title 29, Section 185, which in part reads:

> "§185. Suits by and against labor organizations
>
> (a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Jurisdiction is also granted by the Labor Management Reporting and Disclosure Act, Title 29, Section 411 et seq., which in parts material here reads:

> "§412. Civil action for infringement of rights; jurisdiction
>
> Any person whose rights secured by the provisions of this title [29 USCS §§411 et seq.] have been in-

fringed by any violation of this title [29 USCS §§411 et seq.] may bring a civil action in a district court ofthe United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

(Sept. 14, 1959, P.L. 86-257, Title I, § 102, 73 Stat. 523.)"

also relevant here is Title 28, Section

1337 which reads:

"§1337. Commerce and anti-trust regulations

the district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

June 25, 1948, c. 646, 62 Stat. 931."

R56

Certificate of Service

Three copies of this Petition have been served by U.S. Mail, First Class, Postage Paid, to Attorney Robert N. House, Counsel for Refiners, and to Attorney Jeffrey Julius, Counsel for the Union Respondents this May 31, 1988.

John G. Rust

Counsel for Petitioner

P.57

(2)

No. 87 1981

In The
SUPREME COURT OF THE UNITED STATES
MAY TERM, 1988

CECIL G. HARRIS,

Petitioner

vs.

REFINERS TRANSPORT & TERMINAL CORPORATION, and

vs.

REFINERS TRANSPORT & TERMINAL CORPORATION, and

LOCAL UNION 20, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
and
WILLIAM LICHTENWALD,

Respondents.

APPENDIX ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT

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etc. & William
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TABLE OF CONTENTS OF APPENDIX

John G. Rust, Counsel for Petitioner, hereby certifies that he on May 31, 1988, served three (3) copies of the foregoing Appendix on Attorney Robert N. House, Attorney for Respondent Refiners Transport and Terminal Corp. and also three (3) copies on attorney Jeffrey Julius, attorney for Respondents Local 20, Teamsters, etc. and William Lichtenwald, by U.S. Mail, first class, postage paid.

Respectfully submitted,

John G. Rust

No. 86-3938

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CECIL G. HARRIS,

Plaintiff-Appellant

v.

REFINERS TRANSPORT & TERMINAL CORPORATION LOCAL UNION NO. 20, INTERNATIONAL BROTHERHOOD OF TEAMSTERS CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; AND WILLIAM LICHTENWALD

Defendants-Appellees.

:Filed: Dec. 22, 1987

:ON APPEAL FROM THE UNITED STATES DISTRICT :COURT FOR THE NORTHERN DISTRICT OF OHIO

:

NOT RECOMMENDED FOR FULL-TEXT :PUBLICATION

Sixth Circuit :Rule 24 limits citation to specific sit-:uations. Please see Rule 24 before :citing in a proceedings in a court :in the Sixth Circuit. If cited, a copy :must be served on other parties and the Court. :This notice is to be prominently :displayed if this decision is reproduced.

App. P. 1

BEFORE: MARTIN, JONES and NORRIS, Circuit Judges.

PER CURIAM. In this case, plaintiff-appellant Cecil G. Harris contends that on or around January 10, 1984, he was wrongfully discharged by defendant-appellees Local Union 20, International Brotherhood of Teamsters (the Union), and business agent William Lichtenwald, were unfaithful in their representation of him during his hearing before the Ohio Joint State Grievance Committee. His original action, filed in the United States District Court for the Northern District of Ohio, was pursuant to § 301 of the Labor Management Act, 29 U.S.C. § 185 (1982) and § 202 of the Labor Management Reporting & Disclosure Act, 29 U.S.C. § 411 et. seq (1982). The case was dismissed by the district court in a ruling granting summary judgment to the defendants. Harris appealed to this court. Because we find

App. P. 2

no genuine issue of material fact, we affirm.

Refiners Transport and Terminal Corporation's business is to transport liquid chemicals by the means of tractor-trailer trucks. Plaintiff-appellant Harris, claims that he was fired from his truck driver's job with Refiners because he followed the federal government's safety requirements and his employer's written rules, and because he would not "cut safety corners" or work "for free" as other drivers did.

On January 5, 1984, in accordance with its collective bargaining agreement, Refiners held a pre-discharge meeting with Harris and Local No. 20 representative. At that meeting, Refiners reviewed Harris' work record and indicated that he had violated company rules twelve (12) times during the preceeding nine (9)

APP P. 3

months. Therefore, Refiners claims that Harris' discharge was justified and not violative of its collective bargaining agreement with the Union.

The next day Harris exercised his right under the collective bargaining agreement to file a written grievance protesting his dismissal. Since Refiners and Local No. 20 were unable to resolve the grievance, the **Union** sent Harris' grievance to the Ohio Joint State Grievance Committee (the Committee). A hearing was held on January 10, 1984, during which Refiners again reviewed Harris' work history and its reasons for dismissing him. Both the Union business representative, William Lichtenwald, and Harris gave reasons why Harris' dismissal ought not be upheld. After examining the evidence presented, the Committee deliberated and issued a majority decision sustaining Refiner's discharge of

Harris. Harris then appealed to federal district court.

Harris brought his federal court action pursuant to section 301 of the Labor Management Act, 29 U.S.C. § 185, and Title 1, section 202 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411 et seq. District court jurisdiction was pursuant to 18 U.S.C. §§ 1331, 1337, and 29 U.S.C. § 185. Harris' claim arouse out of his discharge by Refiners and the Union's handling of his grievance. Refiners' motion for summary judgment was granted by the district court because Harris failed to show that either Refiners or Local No. 20 breached the collective Bargaining agreement by acting in a manner which was arbitrary, capricious, or in bad faith. This is the standard Hines v. Anchor Motor Freight, 424 U.S. 554, 570 (1976) states an employee must meet in order

APP P. 5

to prevail in a section 301 action. Harris did not respond to the motion and judgment was entered against him on March 31, 1986.

On April 11, 1986, however, Harris filed a motion for a new trial and a motion to alter and amend judgment pursuant to Fed. R. Civ. P., 59. He also filed a motion to vacate the judgment pursuant to the "inherent power of this Court to reconsider and vacate." On April 30, 1986, he filed a motion for leave to amend his complaint and again moved the district court to vacate the judgment of March 31, 1986, pursuant to Fed. R. Civ. P 60 (b). Each motion was opposed by both defendants. In turn, Harris replied to a number of the defendants' oppositions and a notice of appeal was filed by him on April 30, 1986.

The district court found four motions before it: (1) a motion for

a new trial pursuant to Fed. R. Civ. P. 59 (a); (2) a motion to alter and amend the judgment pursuant to Fed. R. Civ. P. 59(e); (3) a motion to vacate the March 31, 1986 judgment pursuant to Fed. R. Civ. P. 60(b); and (4) a motion for leave of the Court to amend the complaint.

The district court held that a motion for a new trial subsequent to a summary judgment motion was technically improper, 6-Pt. 2 J. Moore, Moore's Federal Practice ¶ 56.26-1 (2d. ed 1987), and therefore found no merit in it. It also concluded that none of Harris' other allegations, even when judged in a light most favorable to him, established a genuine issue of material fact. Thus, the court denied all of Harris motions. Harris now appeals the district court's grant of summary judgment. For the reasons set forth below, we agree that summary judgment was appropriate.

APP P. 7

I.

In Glenway Industries, Inc. v. Wheelabrator-Frye, Inc., 686 F.2d 415 (6th Cir. 1982) (per curiam), we noted that a "court of appeals is mandated to apply the same test in passing upon an award of summary judgment as that utilized by the trial court to grant the motion." Id. at 417 (citing Howard v. Russell Stover Candies, Inc., 649 F.2d 620, 623 (8th Cir. 1981)). It is the task of the district court to determine whether there are any genuine issues of material fact to be resolved without weighing the evidence. In deciding this it "must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant." Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425, 427 (6th Cir. 1962).

In essence, the district court must follow Fed. R. Civ. P. 56(e). In relevant part the Rule states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials . . . [of his] pleading,

APP. P. 8

> but . . . (his) response, by affidavits or as otherwise provided in this rule, is a genuine issue for trial. If . . . (he) does not so respond, summary judgment, if appropriate, shall be entered against . . . (him).

Pursuant to Rule 56(e), once Refiners moved for summary judgment, Harris was obligated to demonstrate that the district court's grant of the motion would be improper. He must have shown either the existence of a material question of fact or that the underlying substantive law did not permit such a decision. Harris did neither. In fact, he did not respond to Refiner's motion. Thus, the district court was forced to rely on the complaint and other portions of the record in deciding whether the defendants were entitled to judgment as a matter of law. In so doing, it concluded that Harris failed to establish that either Refiners or the Union violated the collective bargaining agreement. This conclusion was based upon Harris'

failure to show that the action complained of was done capriciously, arbitrarily or in bad faith. Hines v. Anchor Motor Freight, 424 U.S. 554, 570 (1976). We agree that Harris failed to make this showing and therefore affirm the grant of summary judgment for Refiners.

As for Harris' allegation of unfair representation by the Union, we also find this claim to be without merit. The Supreme Court has held that a breach of the duty of fair representation is found only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190 (1967). We do not think that Harris meets the Vaca standard since the only support he provides for his allegations are his own answers to Refiners' interrogatories and request to produce documents. Thus, we

hold that the district court was correct in labeling those statements conclusory and unsupported. For this reason we conclude that the district court was correct in granting summary judgment for the Union. Accordingly, we AFFIRM the judgment of the district court.

APP. P. 11

APP. P. 11

No. 86-3938

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CECIL G. HARRIS Plaintiff-appellant, v. REFINERS TRANSPORT & TERMINAL CORPORATION, ET AL., Defendants-Appellees	FILED March 1, 1988 JOHN P. HEHMAN, Clerk O R D E R

BEFORE: MARTIN, JONES and NORRIS, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated ot only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

App. P. 12a

submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

APP. P.13

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CECIL G. HARRIS,	*	FILED: Mar. 31, 1986
Plaintiff,	*	No. C 84-7578
-vs-	*	OPINION
REFINERS TRANSPORT & TERMINAL CORP., et al.,	*	and ORDER
Defendants.	*	

* * * * *

WALINSKI, J.

This cause is before the Court on a motion for summary judgment filed by defendant Refiners Transport and Terminal Corporation. Plaintiff has filed no opposition. This action is brought pursuant to § 301 of the Labor Management Relations Act (LMRA), 29 U.S. C. §185, and Title I, §101 of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §411 et seq. Jurisdiction is predicated on 28 U.S.C. §§1331, 1337, and on 29 U.S.C. §185.

APP. P. 13 A

This action arises out of defendant Refiners Transport and Terminal Corp.'s (hereinafter "Company") discharge of plaintiff Cecil G. Harris on or about January 10, 1984 and defendant Union's subsequent handling of a grievance filed by plaintiff protesting the discharge. On July 6, 1984, the plaintiff mishandled the grievance in breach of the duty of fair representation.

Defendant Company moves for summary judgment on three bases. First, defendant claims that plaintiff's §301 claims are barred by the statute of limitations applicable to such claims as set forth in the Supreme Court's decision in Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983). Second, defendant contends that plaintiff's §301 allegations fail because plaintiff has not adequately alleged a breach of the union's duty of fair representation. Finally, defendant claims that §301 claim must fail

APP. RIK

because plaintiff has not alleged exhaustion of internal union remedies.

Fule 56, Fed. R. Civ. P., directs the disposition of a motion for summary judgment. In relevant part Rule 56(c) states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In ruling on a motion for summary judgment, the Court's function is to determine if any genuine issue exists, if such an issue exists. United States v. Diebold, Inc., 369 U.S. 654 (1962); Tee-Pak, Inc. v. St. Regis Paper Co., 491 F.2d 1193 (6th Cir. 1974). Further, "(i)n ruling on a motion for summary judgment, the Court must construe the evidence in its most favorable light for theparty opposing the motion and against the movant." Bohn

APP. R 15

Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425, 427 (6th Cir. 1962). To summarize, if the movant demonstrates that he is entitled to a judgment as a matter of law, then the Court must next weigh the evidence in a light most favorable for the party opposing the motion; if reasonable minds could differ as to a material fact in issue, then a genuine factual dispute exists and the motion for summary judgment must be denied.

Rule 56(e) places a responsibility on the party against whom summary judgment is sought to demonstrate that summary judgment is improper, either by showing the existence of a material question of fact or that the underlying substantive law does not permit such a decision. In relevant part the provision states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations

APP. P. 16

> or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Fed. R. Civ. P.

Plaintiff did not respond to defendant's motion in the instant case, and thus the Court was constrained to rely on the complaint and other portions of the record in determining that defendants are entitled to judgment as a matter of law.

The Court notes at the outset, however, that defendant's first argument in support of its motion for summary judgment is without merit. Defendant claims that although plaintiff filed the instant cause of action within the six-month statute of limitations period as set forth in Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), plaintiff's failure to serve defendant with the summons

APP. P. 17

and complaint within the six-month limitations period results in a bar to this suit. This Court disagrees. The Sixth Circuit recently addressed the issue in Macon v. Continental Baking Co., 779 F.2d 1166 (6th Cir. 1985) finding that the six-month limitation upon hybrid 301/ fair representation suits borrowed from §10(b) of the National Labor Relations Act does not require that service of the complaint must be accomplished within the six-month period. Instead, such actions are governed by the filing and service requirements under the Federal Rules of Civil Procedure generally applicable to civil suits in the district courts. Accordingly, since plaintiff properly filed suit within the six-month limitations period, the failure to effect service within the six-month period does not act as a bar to plaintiff's suit.

APP. P. 18

Defendant's next argument, however, is found to have merit. Although it is not entirely clear from the face of the complaint, the instant action appears to be brought against defendant Company for breach of the collective bargaining agreement. It is well settled that an employee seeking to recover from his employer and his union in an action under §301 of the LMRA, must establish both that the applicable collective bargaining agreement was violated and that his union failed to represent him properly. Hines v. Anchor Motor Freight, 424 U.S. 554, 570, (1976)

A breach of the duty of fair representation is found only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190 (1967). Further, the allegations of the complaint must contain more than conclusory statements. Plaintiff must make a showing

that the action was improper. Balowski v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, 372 F.2d 829 (6th Cir. 1967). Plaintiff's claim in this action falls far short of meeting this standard. The allegations regarding the Union's actions are contained in the complaint at ¶¶9-12. The plaintiff alleges that his membership in the Teamsters for a Democratic Union was brought out during the grievance procedure and as a result plaintiff was not represented by the union in a fair, loyal and good faith manner. The only support for these allegations are contained in plaintiff's answers to defendant's interrogatories and request to produce documents. Contained therein are plaintiff's conclusory and unsupported statements with regard to union actions. Upon an examination of the relevant paragraphs of the complaint as well as the remainder of the record,

the Court fails to find facts to support plaintiff's allegations that the union acted in a manner which was arbitrary, capricious or in bad faith.

In light of the Court's finding on this issue, it is unnecessary to address defendant's argument with regard to plaintiff's failure to exhaust internal union remedies. Plaintiff has failed to establish any genuine issue of material fact and it is, therefore

ORDERED that defendant Refiners Transport and Terminal Corporation's unopposed motion for summary judgment is granted.

FURTHER ORDERED that his cause is dismissed.

Nicholas J. Walinski (s)
SENIOR U. S. DISTRICT JUDGE

Toledo, Ohio
March 26, 1986

APP. 21

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CECIL G. HARRIS, * FILED: Sept. 5, 1986

Plaintiff, * No. C 84-7578

vs. * OPINION and ORDER

REFINERS TRANSPORT & TERMINAL CORP., et al., *

Defendant.

* * * * *

WALKINSKI, J.

Plaintiff originally brought this action pursuant to §301 of the Labor Management Act, 29 U.S.C. §185, and Title I, §202 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §411 et seq. Jurisdiction is based upon 18 U.S.C. §§1331, 1337, and on 29 U.S.C. §185. This action arose out of defendant Refiners Transport and Terminal Corp's discharge of the plaintiff and defendant Union's subsequent handling of the grievance

APP. P. 23

instituted by the plaintiff. The defendant Company's motion for summary judgment was granted in this Court's opinion and order of March 26, 1984, on the basis that the plaintiff failed to show that the company, and the union, breached the collective bargaining agreement by acting in a manner which was arbitrary, capricious, or in bad faith as required by Hines v. Anchor Motor Freight, 424 U.S. 554, 570 (1976). The plaintiff did not respond to the motion. This Court found no genuine issue of material fact and accordingly, judgment was entered against the plaintiff on March 31, 1986.

The cause is now before the Court on a number of motions filed by the plaintiff. On April 11, 1986, the plaintiff filed a motion for a new trial under Rule 59, Fed. R. Civ. P., a motion to alter and amend judgment pursuant to Rule 59, Fed. R. Civ. P., and a motion to vacate the

judgment pursuant to the "inherent power of this Court to reconsider and vacate." On April 30, 1986 the plaintiff filed a motion for leave to amend his complaint and again moved the Court to vacate the judgment of March 31, 1986, pursuant to Rule 60(b), Fed. R. Civ. P. Each motion has been opposed by both defendants. The plaintiff has replied to a number of the defendants' oppositions. Further, a notice of appeal was filed by the plaintiff on April 30, 1986.

Upon a close review of the record this Court finds that there are four motions before the Court: (1) a motion for a new trial pursuant to Rule 59(a), Fed. R. Civ. P.; (2) a motion to alter and amend the judgment pursuant to Rule 59(e), Fed. R. Civ. P.; (3) a motion to vacate the March 31, 1986 judgment pursuant to Rule 60(b), Fed. R. Civ. P.; and (4) a motion for leave of Court to amend the

APP. P. 25

complaint. Because of the multiple filings before the Court, each of the respective arguments from memoranda will be addressed in the order cited above without specific reference to a particular party's memoranda.

In his motion for a new trial and the motion to alter and/or amend the judgment, the plaintiff argues that; (1) he has a valid cause of action, and "he should be given a full opportunity to secure and present evidence;" (2) the defendant's motion for summary judgment lacked affidavits challenging the plaintiff's factual claims; (3) the plaintiff's counsel will work hard to pursue matters in an efficient manner, should he prevail at these proceedings; (4) the plaintiff's counsel was overburdened and failed to "advise the Court of additional steps desired to be taken in bringing to light the truth;" and (5) the application of the law to the actions of

the Union and Company are questions of fact to be resolved by the jury.

A motion for a new trial subsequent to a summary judgment motion is technically improper. 6 Pt. 2 J. Moore's Federal Practice ¶56.26 (2d. ed 1985); 25 Fed Proc, L Ed §743. However, it is generally accepted that a district court may review a summary judgment motion pursuant to Rule 59(e) and provide relief. 25 Fed Proc, L Ed §§769-71. Accordingly, this Court finds no merit in the motion for a new trial, but instead will address the merits of the motion to alter and amend the judgment, as the net relif requested is identical.

The Court finds no merit in plaintiff's first argument in favor of his motion to alter and amend that he should be given an opportunity to present this case to the Court. The plaintiff was adequately served with the motion for summary judgment, and at his request a sixty-day extension to

respond was granted by this Court. However, the plaintiff failed to respond at all. Only after this Court's ruling did the plaintiff come forward with a response. Accordingly, this Court is unpersuaded by this argument.

The plaintiff next argues that the judgment should be amended because the defendant did not present affidavits challenging the plaintiff's factual basis. Under Rule 56, Fed. R. Civ. P., there is no requirement that the moving party present affidavits attacking the opposing party's responsibility, under Rule 56(e), to demonstrate that summary judgment is improper by showing the existence of a material question of fact. The plaintiff failed to raise an issue of fact, and judgment was entered against him. Clearly, plaintiff's argument is misplaced here and not well taken by this Court. Similarly, plaintiff's contention, that the defendants'

actions, as they relate to the law, are questions of fact to be resolved by the jury is ill-founded. Plaintiff simply failed to raise any material issue of fact. Reasonable minds could come to but one conclusion, that no material issue of fact existed. This was clearly a situation where summary judgment was appropriate and plaintiff's contention is not persuasive.

Plaintiff's last two arguments in favor of his motion to amend: (1) to work efficiently; and (2) counsel's admitted failure to "advise" the Court of "events to be taken" are accepted as true and appreciated. However, such commitment and sincerity do not provide the Court with a basis an which to vacate on earlier ruling.

Having addressed each of plaintiff's arguments in favor of a motion to amend and/or alter a judgment and finding each without merit, the motion is denied.

P.30 APP. R 29

Plaintiff next moves this Court to vacate the judgment of March 31, 1986 pursuant to Rule 60(b), Fed. R. Civ. P.1

(Footnote P1 above reads:

"[1]The defendant union argues that this Court is without jurisdiction to consider a motion to vacate once a notice of appeal has been filed. Generally, a district court loses jurisdiction over a matter once the notice of appeal is filed. First Nat. Bank of Alsem Ohio v. Hirsch, 535 F.2d 343, 345 n.1 (1976). However, in First Nat. Bank of Salem, Ohio the Sixth Circuit clearly established that it is within the district court's discretion to consider and resolve a motion to vacate subsequent to the filing of notice to appeal. 535 F.2d at 345-46 (citing Herring v. Kennedy Hardware Co., 261 F.2d 202 (6th Cir. 1958)). Accordingly, this Court has jurisdiction over the present motion.")

"A motion to vacate judgment under Rule 60(b) is addressed to the sound discretion of the Court . . . ." Smith v. Kincaid, 249 F.2d 243 (6th Cir. 1957). The rule empowers the Court to relieve a party from a final judgment order or processing for any of six enumerated reasons. Plaintiff seeks relief pursuant to subsections (1) and (3) of the rule.

APP. P. 31

Subsection of (1) of Rule 60(b) provides that the Court may relieve a party of a judgment because of "mistake, inadvertance, surprise or inexcusable neglect . . . " Plaintiff argues that he intended to file a response to the defendant's summary judgment motion but failed to do so "through oversight and failure to judge correctly (sic) when the Court would rule . . . ." This is an unacceptable argument. As discussed earlier, the plaintiff was given a sixty-day extension to file a response, yet a response was never filed. Further, the plaintiff has failed to come forward with an explanation for the "oversight" and without such an explanation this Court cannot find merit in the claim. Accordingly, the plaintiff has failed to establish any mistake or excusable neglect. See Kendall v. Hoover Co., 751 F.2d 171 (6th Cir. 1984).

Subsection (3) of Rule 60(b) provides

for relief from a judgment on a showing of "fraud, . . . misrepresentation, or other misconduct of an adverse party." Plaintiff claims that the defendant company concealed information regarding the plaintiff's dismissal from the Court. This Court cannot find any support, whatsoever in the record for this claim and therefore finds no instance of fraud misrepresentation or other wrongdoing.

Accordingly, after addressing each of plaintiff's arguments in support of a motion to vacate the judgment and finding each unsupportable, the motion is hereby denied.

Finally, the plaintiff motions this Court for leave to amend his complaint. The plaintiff argues that given Mr. Harris' affidavit along with "other documents" he makes out a prima facie case and should be allowed to file an amended complaint.

Plaintiff relies on Chapman & Dewey Lumber Co. v. United States, 359 F. 2d 495 (6th Cir. 1966), insupport of his claim. That case, however, is easily distinguishable from the present action. In Chapman, the Sixth Circuit Court of Appeals was impressed by the fact that an opposition to a summary judgment was not made possible because of the district court's actions and therefore allowed the non-moving party to remedy the defects. It was thought that the district court's apparent lack of formality of notice of oral argument and the close proximity of the notice to the trial was an indication that the motion was to be denied. 359 F.2d at 496. Here, however, there can be no such claim.

The plaintiff had an ample opportunity to oppose the motion, and this Court gave absolutely no indication that it would rule one way or the other. Further, in Chapman, the affidavits filed with the motion

presented "issues of material fact." That is not the case here. Even if the Court were to consider Mr. Harris' affidavit and the amended complaint, no issue of material fact would be presented. The amended complaint and the affidavit merely reasserts, vigorously, allegations were considered in a light most favorable to the plaintiff in ruling on the motion for summary judgment and found not to establish a genuine issue of material fact. Accordingly, leave to amend the plaintiff's complaint would not establish a prima facie case; plaintiff's argument is not well taken.

It is therefore,

ORDERED that plaintiff's motion for a new trial is denied.

FURTHER ORDERED that the plaintiff's motion to alter and/or amend the judgment is denied.

FURTHER ORDERED that the plaintiff's

motion to vacate the judgment is denied.

FURTHER ORDERED that the plaintiff's motion for leave to file an amended complaint is denied.

Nicholas J. Walinski(s)

SENIOR U.S. DISTRICT JUDGE

APP. P. 36

Toledo, Ohio
September 3, 1986

UNITED STATES DISTRICT COURT
NORTHERN DIST. OHIO, WESTERN DIVISION

Cecil G. Harris

v.

Refiners Transport & Terminal Corp., et al.

C 84-7578

JUDGE: NICHOLAS J. WALINSKI

FILED: Sept. 5, 1986

Decision by Court. This action came to hearing before the Court with the judge named above presiding. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff's motion for new trial denied; plaintiff's motion to alter and/or amend judgment denied; plaintiff's motion to vacate judgment denied; plaintiff's motion for leave to file amended complaint denied.

Nicholas J. Walinski (s)
SENIOR U.S. DISTRICT JUDGE

APP. P. 37

(3)

No. 87-1981

IN THE

Supreme Court of the United States

October Term, 1988

CECIL G. HARRIS,
Petitioner,

vs.

REFINERS TRANSPORT & TERMINAL CORPORATION
and
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS UNION, LOCAL NO. 20
and
WILLIAM LICHTENWALD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT UNION'S BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTIONS PRESENTED

I. Whether Summary Judgment is properly granted where, in an action brought pursuant to Section 301 of the Labor Management Relations Act by a discharged employee, the employee fails to oppose motions for summary judgment filed by the employer and the union?

II. Whether a Motion to amend a judgment and/or a Motion for leave to file an amended complaint must be granted after unopposed motions for summary judgment have been granted?

III. Whether there is a right to a jury trial in an action brought pursuant to Section 301 of the Labor-Management Relations Act?

LIST OF PARTIES

The parties to the proceedings below were Petitioner Cecil G. Harris and Respondents Refiners Transport & Terminal Corp.; Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 20 and William Lichtenwald.

The Respondents before this Court include Refiners Transport & Terminal Corp. and Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 20.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Text

No. 87-1981

IN THE

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not been reported. It is substantially reprinted at p. 1 of the Appendix to the petition.

The opinion and orders of the United States District Court for the Northern District of Ohio (Walinski, *D.J.*), have not been reported. They are substantially reprinted at p. 13 of the Appendix to the petition.

JURISDICTION

The Respondent Union does not contest the statement of jurisdictional grounds set forth in the Petition of Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

The Respondent Union does not contest the Petitioner's statement of relevant statutory provisions set forth in the Petition for a Writ of Certiorari.

COUNTERSTATEMENT OF THE CASE

The Respondent International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 20 (hereinafter referred to as the "Union") adopts by reference the facts as stated by the United States Court of Appeals for the Sixth Circuit in its Opinion of December 22, 1987. *See*, Petition Appendix at p. 1. The pertinent facts can be simply stated. Refiners Transport and Terminal Corporation (hereinafter referred to as the "Company") is in the business of transporting liquid chemicals. The Company's employees are represented for the purposes of collective bargaining by the Union. The Company and the Union are, and have been at all relevant times, signatory to a collective bargaining agreement. *See*, Petition Appendix at p. 3. Petitioner, Cecil Harris, was discharged by the Company from his truck driver's job because the Company found that Harris had accumulated numerous violations of Company rules on his work record. *See*, Petition Appendix at p. 3, 4.

On January 5, 1984, pursuant to the collective bargaining agreement between the Company and the Union, the Company held a pre-discharge meeting with petitioner and a Union representative. At that meeting, the Company reviewed petitioner's work record and indicated that he had violated Company rules twelve (12) times during the preceding nine (9) months. Thus, the Company claimed that the discharge of petitioner was justified and did not violate its collective bargaining agreement with the Union.

Subsequently, petitioner filed a written grievance protesting the discharge. After the Company and the Union were unable to agree upon a resolution to the grievance, the Union referred petitioner's grievance to

the Ohio Joint State Grievance Committee[1] (hereinafter referred to as the "Committee") pursuant to the collective bargaining agreement. *See,* Petition Appendix at p. 4.

A hearing before the Committee on petitioner's grievance was held on January 10, 1984. Both the Company and the Union were represented at the hearing. The Company read the discharge letter sent to petitioner dated January 9, 1984. Then the Company reviewed petitioner's work record and the events leading up to the decision to discharge petitioner. The Company argued that based on these factors the Company's discharge of petitioner should be sustained. *See,* Petition Appendix at p. 4.

William Lichtenwald, the Union's business agent, then presented petitioner's case before the Committee. The Union stated that petitioner with the aid of the Union, had sent a letter of protest after each action taken by the Company regarding petitioner. Further, the Union presented petitioner's response to each matter raised by the Company. *See,* Petition Appendix at p. 4. After William Lichtenwald completed his presentation, petitioner was given an opportunity to speak on his own behalf and did so. *See,* Petition Appendix at p. 4. The Committee deliberated on the facts presented and issued a majority decision sustaining the Company's discharge of petitioner. *See,* Petition Appendix at p. 4-5.

Petitioner then brought this action in the United States District Court for the Northern District of Ohio, Western Division, pursuant to Section 301 of the Labor

[1] The collective bargaining agreement provides a procedure by which, in the event the Company and the Union are unable to resolve a grievance, the grievance is forwarded to the Ohio State Joint Grievance Committee. The Committee is composed of individuals representing various companies and union locals who are signatory to the collective bargaining agreement. In the event that a decision is rendered by a majority of the Committee members, such decision is final and binding on the parties.

Management Relations Act (hereinafter referred to as the "LMRA"), 29 U.S.C. Section 185, and, Section 101 of the Labor Management Reporting and Disclosure Act (hereinafter referred to as the "LMRDA"), 29 U.S.C. Section 411 on July 6, 1984. Thereafter, the Company filed a Motion for Summary Judgment on June 7, 1985. Petitioner failed to respond to the Motion, which was granted on March 31, 1986, and Judgment was entered against him. *See,* Petition Appendix at p. 6.

On April 11, 1986, petitioner filed a Motion for a new trial and a motion to alter and amend judgment pursuant to the "inherent power of this Court to reconsider and vacate." Further, on April 30, 1986, petitioner filed a motion for leave to amend his complaint and again moved the district court to vacate the judgment of March 31, 1986, pursuant to Federal Rule of Civil Procedure 60(b). The Union and the Company opposed each motion. *See,* Petition Appendix at p. 6.

The District Court ruled that a motion for a new trial subsequent to summary judgment was technically improper and thus found it to be without merit. *See,* Petition Appendix at p. 7. It also concluded that none of petitioner's other allegations established a genuine issue of material fact, even when judged in a light most favorable to him. Accordingly, the District Court denied all of petitioner's post-judgment motions. *See,* Petition Appendix at p. 7.

Petitioner subsequently appealed the district court's grant of summary judgment to the United States Court of Appeals for the Sixth Circuit. On December 22, 1987, the Court of Appeals affirmed the District Court's grant of summary judgment. For the reasons that follow, the Petition for Writ of Certiorari must be denied and the December 22, 1987 affirmation of the United States Court of Appeals for the Sixth Circuit must stand.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT.

Conspicuously absent from the petition in the instant matter is any statement regarding the "special and important reasons" which would warrant the exercise of this Court's discretionary power to review upon certiorari. *See,* U.S. Sup. Ct. Rule 17. In this regard, there is no conflict among the federal courts of appeal on the issues; the instant case does not present any undecided question of federal law; and the decision of the Court of Appeals in the instant case does not conflict with any of the applicable decisions of this Court. Indeed, this Court has long maintained that a writ of certiorari does not issue except in cases of public importance, or where there exists a *real* conflict of authority between the federal courts of appeal. *See, Wayne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 393 (1923); *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74, 79 (1955). The petitioner attempts to bring the instant case within one of the narrow categories of cases appropriate for certiorari review by apparently arguing that the Company failed to prove that petitioner was discharged in a manner consistent with the collective bargaining agreement, that the Union failed to prove that it did not breach the duty of fair representation, and that summary judgment was therefore improperly granted.

The instant case developed through the courts below as a "hybrid" action: the petitioner brought a claim against the Company under Section 301 of the LMRA

for breach of a collective bargaining agreement and a claim against the Union for breach of the duty of fair representation. *See, United Parcel Service v. Mitchell,* 451 U.S. 56 (1981). To prevail against *either* the Company *or* the Union, petitioner was required to prove that the applicable collective bargaining agreement had been violated *and* that a breach of the duty of fair representation had occurred. *See, Hines v. Anchor Motor Freight,* 424 U.S. 554 (1976).

Furthermore, in order to demonstrate a breach of the duty of fair representation, petitioner was obligated to show that the Union's actions were arbitrary, discriminatory or taken in bad faith. *See, Vaca v. Sipes,* 386 U.S. 171 (1967). In this regard, a Union's good faith negligence or mistakes are insufficient to breach the duty, rather there must be a substantial showing of *specific facts* demonstrating fraud, deceit or dishonesty. *See, Motor Coach Employees v. Lockridge,* 403 U.S. 274 (1971); *Humphrey v. Moore,* 375 U.S. 335 (1964). Conclusory statements that union conduct is arbitrary, discriminatory or in bad faith are clearly insufficient to sustain a plaintiff's burden of proof. *See, Whitten v. Anchor Motor Freight,* 521 F.2d 1335 (6th Cir., 1975), *cert. denied,* 425 U.S. 981 (1976).

The evidentiary standards discussed above are necessarily implicated where a motion for summary judgment has been filed. Thus, "the inquiry involved in ruling on a motion for summary judgment. . .implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 254 (1986).

In this regard, Federal courts of appeals are required to apply the same standard used by the trial court upon reviewing a grant of summary judgment. *See, Glenway*

Industries, Inc. v. Wheelaborator-Frye, Inc., 686 F.2d 415 (6th Cir., 1982); *Howard v. Russell Stover Candies, Inc.*, 649 F.2d 620 (8th Cir., 1981). Upon considering whether a motion for summary judgment has been properly granted, the appellate court reviews the record and determines whether or not there is any genuine issue of material fact, and if there is not, whether or not the substantive law was correctly applied upon determining that the proponent of the motion was entitled to judgment as a matter of law. *See generally*, 6-Pt. 2, *Moore's Federal Practice*, ¶ 56.27[1] (2d ed. 1988). Indeed, this standard of review is identical to the standard contemplated by Rule 56 of the Federal Rules of Civil Procedure, which governs when and how a motion for summary judgment is to be granted. *See*, Rule 56 of the Federal Rules of Civil Procedure.

The procedure mandated by Rule 56 of the Federal Rules of Civil Procedure has been recently explained and clarified by this Court. *See, Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In *Celotex Corp.*, this Court made clear that once a motion for summary judgment is filed, it is incumbent upon the opponent of the motion to establish the existence of an issue of material fact essential to the opponent's case. *Celotex Corp.*, 477 U.S. at 322. In the absence of such a showing, the entry of summary judgment is appropriate. *Id.* Thus, in order to defeat the motion, the non-moving party must go "beyond the pleadings and designate specific facts showing there is a genuine issue for trial." *Id.* at 324. *See also, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

In the instant case, the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Northern District of Ohio both

found that petitioner neither demonstrated that an issue of material fact existed nor that the substantive law did not permit the entry of judgment for respondent union. In fact, petitioner never made any attempt to respond to the Company's motion for summary judgment. Thus, the Court of Appeals agreed with the District Court's disposition of the Company's motion for summary judgment. The Court of Appeals routinely applied the law discussed above and found that the undisputed material facts available in the record revealed that the Company did not breach the collective bargaining agreement. Moreover, the Court of Appeals affirmed the District Court's determination that the undisputed facts revealed no breach of the duty of fair representation. Petitioner's conclusory and unsupported statements contained in his answers to interrogatories were insufficient to demonstrate arbitrary, discriminatory or bad faith conduct.[2] The mere existence of a scintilla of evidence in support of a plaintiff's position is insufficient to deny a properly presented motion for summary judgment. *See, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

[2] In light of the initial propriety of the District Court's grant of summary judgment, and the Court of Appeals' subsequent affirmance of the same, it is clear that there is no need to consider petitioner's stated "issues" regarding its various post-judgment motions. Likewise, it is similarly unnecessary for this Court to consider petitioner's claims regarding the right to a jury trial in hybrid action brought pursuant to Section 301 of the LMRA. In this regard, because the grant of summary judgment was proper in all respects, petitioner was not prejudiced by any lack of a jury trial. The very nature of a motion for summary judgment is to determine whether or not there are issues which are to be resolved by a jury. *See, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In the instant case, both courts determined that there were no genuine issues remaining for resolution, either by bench or jury trial. Consequently, the issue regarding the right to a jury trial is not presented to this Court in any appropriate posture. Indeed, a review of the petition presently before this Court reveals an absolute lack of serious discussion regarding this issue.

Thus, because the grant of summary judgment below was proper, and granted in accordance with the standards enunciated by this Court and reflected in Rule 56 of the Federal Rules of Civil Procedure, none of the "special and important reasons" required by Sup. Ct. R. 17 existed here. Moreover, the decision below presents no conflict with the decisions of this Court or the decisions of any other federal Court of Appeals. Indeed, petitioner never alleges any such conflict. Therefore, this Court must refuse certiorari.

II. IT IS INAPPROPRIATE FOR THIS COURT TO GRANT CERTIORARI IN THIS CASE, WHERE THE PETITIONER ASKS THIS COURT TO MAKE FINDINGS OF FACT.

The petition in the instant case must also be denied on the ground that petitioner improperly asks this Court to review and enter findings of facts. This Court has consistently denied certiorari when asked to review factual findings. For example, it has been stated that, "[we] do not grant certiorari to review evidence and discuss specific facts". *United States v. Johnson*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984). Further, this Court has held that it cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. *See, Graver Mfg. Co. v. Linde Co.*, 366 U.S. 271, 275 (1949). Thus, it is clear that certiorari should not be granted where the Court is presented primarily with a question of fact. *See, NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981).

In the instant case, petitioner makes a long, rambling statement of the case including a detailed description of the "facts" as envisioned by petitioner. Petitioner quotes extensively from his answers to interrogatories in an attempt to bolster his claims of wrongful discharge. However, petitioner's legal arguments are given short shrift in his petition. At no place in the petition is there any consideration given to the question of whether or not the District Court and the Court of Appeals made any error, legal or otherwise. The thrust of petitioner's case is that the factual findings of the District Court and the Court of Appeals that there existed no genuine issue of fact and that respondents were entitled to judgment as a matter of law were erroneous and that this Court must now credit his version of the facts. As discussed above, such factual determinations are not the proper subject for certiorari. Clearly, petitioner's attempt to retry the facts, previously found to be clear and undisputed by two lower courts, fails to raise any special or important questions which should cause this Court to exercise its discretionary power of review. Therefore, the Court must deny the petition.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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(4)

No. 87-1981

IN THE

Supreme Court of the United States

October Term, 1988

CECIL G. HARRIS,
Petitioner,

vs.

REFINERS TRANSPORT & TERMINAL CORPORATION
and
LOCAL UNION 20, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA
and
WILLIAM LICHTENWALD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT REFINERS TRANSPORT & TERMINAL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Sixth Circuit correctly affirm the judgment of the District Court granting summary judgment to Respondents by determining that no genuine issue of material fact existed in support of Petitioner's hybrid §301 action under the Labor Management Relations Act, 29 U.S.C. §185(a)?

II.

RULE 28.1 STATEMENT

Respondent Refiners Transport & Terminal Corporation is a wholly owned subsidiary of Leaseway Transportation Corp. which is a wholly owned subsidiary of Leaseway Holdings, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Statutes

Rules

No. 87-1981

IN THE

Supreme Court of the United States

October Term, 1988

CECIL G. HARRIS,
Petitioner,

vs.

REFINERS TRANSPORT & TERMINAL CORPORATION
and
LOCAL UNION 20, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA
and
WILLIAM LICHTENWALD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT REFINERS TRANSPORT & TERMINAL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Refiners Transport & Terminal Corporation, hereby respectfully requests that this Court deny the Petition for Writ of Certiorari.

The opinions below and the basis of this Court's jurisdiction are set forth at pages 7 through 10 of the Petition and in Petitioner's Appendix. With the exception of typographical-printing errors the opinions below as set forth in the Appendix are substantially accurate.

STATUTORY PROVISION INVOLVED

Labor-Management Relations Act of 1947 §301(a), (29 U.S.C. §185(a)):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioner, Cecil Harris, commenced this action in the United States District Court for the Northern District of Ohio in July, 1984. Asserting jurisdiction under §301 of the Labor Management Relations Act, Harris alleged, in what is commonly known as a "hybrid" §301 action, that Respondent, Refiners Transport & Terminal Corporation ("Refiners") breached the collective bargaining agreement when it discharged him from employment. Harris also alleged that

Respondent Teamsters Local 20 breached its duty of fair representation in the handling of his grievance and arbitration proceedings concerning his discharge from employment.

Harris was discharged in January, 1984 because he had accumulated twelve (12) violations of the company's uniform rules during a nine (9) month period. Harris filed a grievance over his discharge and that grievance was ultimately presented before the collectively bargained joint arbitration committee. After hearing the case, the arbitration committee upheld the discharge.

In response to the lawsuit, Refiners moved for summary judgment in the United States District Court in June, 1985. In its motion Refiners asserted, among other arguments, that Harris' §301 claims were deficient in that Harris alleged only insufficient facts and nothing more than conclusory statements in support of his contention that the union breached its duty of fair representation.

Harris did not respond to Refiners' motion for summary judgment, even though the district court granted him a sixty (60) day extension of time in which to file a brief in opposition. On March 31, 1986, after the passage of some ten months, the district court granted Refiners' Motion for Summary Judgment holding that neither the record before the court nor Harris' complaint contained sufficient facts to support Harris' allegations that the union acted in a manner which was arbitrary, capricious or in bad faith (Petitioner's Appendix, pp. 13A-21 at pp. 19-21).

Harris filed several post-judgment motions all of which were denied by the district court (Petitioner's Appendix, at pp. 23-38). Following the denial of all of Harris' post-judgment motions, he appealed the district court's granting of summary judgment.

In an unpublished opinion filed on December 22, 1987, the Sixth Circuit Court of Appeals affirmed the summary judgment granted by the district court (Petitioner's Appendix, pp. 1-11, at 10, 11). Harris filed a Petition for Rehearing *En Banc* to the Sixth Circuit Court of Appeals. On March 1, 1988 the court denied the petition finding that the issues raised in the petition were fully considered upon the original submission and decision of the case (Petitioner's Appendix at pp. 12-13).

REASONS WHY THE PETITION SHOULD BE DENIED

I. SUMMARY JUDGMENT WAS PROPERLY GRANTED IN RESPONDENTS' FAVOR SINCE PETITIONER FAILED TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT.

A. The holding of the court below is consistent with well settled Supreme Court precedents for the granting of summary judgment.

This Court has long recognized and consistently held that the entry of summary judgment is mandated against a party who fails to establish the existence of a genuine, triable issue of material fact. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The Party opposing a motion for summary judgment "may not rest

upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine fact for trial". *First National Bank of Arizona v. Cities Service Co., supra*, 391 U.S. at 288 (1968).

Reiterating the standard for summary judgment established in Rule 56(c) of the Federal Rules of Civil Procedure, this Court recently emphasized the burden of the non-moving party in a summary judgment proceeding to demonstrate the existence of the essential elements of his case.

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact", "since a complete failure of proof concerning a party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

Moreover, this Court also observed that it is not necessary for the moving party to submit affidavits negating the opposing party's claims. Rather, the movant need only point out to the district court that there is an absence of evidence to support the non-moving party's claims.

> . . . we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, *if any*" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(c) and (b), which provide that

> claimants and defendants, respectively, may move for summary judgment *"with or without supporting affidavits"*. (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c) is satisfied. *Celotex Corp., supra*, at 323.

Additionally, this Court explained in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) that to survive summary judgment there must be a showing of a genuine issue of *material* fact rather than just an issue over some irrelevant or unnecessary facts.

> By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment;
>
> * * * * *
>
> Factual disputes that are irrelevant or unnecessary will not be counted. *Anderson v. Liberty Lobby, Inc., supra*, 477 U.S. 247-248.

Next, and as this Court also observed in *Anderson v. Liberty Lobby, Inc., supra*, it is the substantive law that identifies which facts are material.

B. The court below correctly applied the standards set forth in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) and *Vaca v. Sipes*, 386 U.S. 171 (1967) in holding that Petitioner failed to establish a genuine issue of material fact in his hybrid §301 action.

Turning to the substantive law involved in a hybrid §301 case, it is well settled that in order to prevail, a plaintiff must prove *both* that the employer breached the

collective bargaining agreement *and* that the union breached its duty of fair representation. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Vaca v. Sipes*, 386 U.S. 171 (1967). Accordingly, to prevail against either the company or the union a plaintiff must prove both elements. *Hines, supra*, at 570. If Petitioner cannot show even one element, his claim must fail.

Moreover, a breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes, supra* at 190. Thus, to prevent the granting of summary judgment in a hybrid §301 action a plaintiff must show the existence of a genuine issue of material fact as to whether the union's conduct toward him was arbitrary, discriminatory, or in bad faith.

Additionally, it is equally well settled that in order to show the existence of a genuine issue of material fact with respect to either of the elements of a hybrid §301 action, a plaintiff must present more than mere conclusory statements or unsupported allegations. *E.g., Whitten v. Anchor Motor Freight, Inc.*, 521 F.2d 1335 (6th Cir., 1975), *cert. denied*, 425 U.S. 981 (1976); *Balowski v. UAW*, 372 F.2d 829 (6th Cir., 1967). In fact, as this court noted in *Anderson v. Liberty Lobby, supra*, a party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings but must instead set forth *specific facts* showing that there is a genuine issue for trial. The non-moving party must present affirmative evidence from which the trier of fact might return a verdict in his favor. Otherwise, summary judgment is well taken. 477 U.S. at 256, 257.

Respondent Refiners, as the moving party, met its burden once it "showed-that is, pointed out to the district court-that there [was] an absence of evidence to support [an essential element] of the non-moving party's case". *Celotex Corp. v. Catrett*, 477 U.S. at 325. Thus, once it was "pointed out" that there was an absence of evidence to show that the union breached its duty of fair representation, an essential element in a hybrid §301 case, the burden then passed to Petitioner Harris to present specific facts to show that the union did breach the *Vaca v. Sipes, supra*, duty of fair representation standard.

In this regard and after reviewing the record, the court below determined that in response to Refiners summary judgment motion Harris failed to show either the existence of a material question of fact or that the underlying substantive law did not permit such a decision.

In the case at hand, the court below properly applied the standard for entry of summary judgment against Petitioner Harris. Specifically, the court determined in response to Refiners' motion for summary judgment that Harris had failed to meet the *Vaca* standard because he failed to show that the union's conduct toward him was arbitrary, discriminatory or in bad faith. In fact, Harris failed entirely to respond to Refiners' motion for summary judgment even after the passage of some ten months. Accordingly, the district court searched the complaint and record in deciding the motion. The only support for Harris' allegations were the conclusory and unsupported statements in his complaint and discovery answers. This, the court found, was insufficient to show the existence of a genuine issue of material fact. (Petitioner's Appendix, pp. 10, 11).

Quite simply, Harris failed to establish the existence of one of the essential elements of his case. Thus, the court below properly applied the law regarding the entry of summary judgment and review is clearly not merited.

II. THIS CASE DOES NOT MERIT SUPREME COURT REVIEW.

Rule 17 of the Rules of the Supreme Court of the United States provides that:

> A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore.

No such special and important reasons exist in this case.

The decision of the court below is fully consistent with its prior rulings. Moreover, the decision was also consistent with the authority from other circuits as well as the precedents of this Court.

Petitioner disagrees with the factual determinations made by the court below and through the Petition for the Writ is seeking to have this Court review those factual findings. This however is not the purpose of a Writ of Certiorari.

Simply stated, this case does not involve any conflict between the circuits nor does it present a federal question in conflict with a state court. Likewise, this claim is not of national importance. Rather, it is a case involving a straightforward application of the hybrid §301 precedents to a situation in which the plaintiff presented no evidence to support his claims or allegations. Therefore, this case does not satisfy the requirements and standards set forth in Rule 17.

CONCLUSION

Based on all of the foregoing reasons Respondent Refiners respectfully requests that this Court deny the Petition for Writ of Certiorari. The district court and the Sixth Circuit properly found that no genuine issue of material fact existed in support of Petitioner's hybrid §301 action.

Moreover, this case does not merit Supreme Court review as it presents no conflict between or among the circuits, no conflict with the precedents of this Court, and no issue of such importance as to warrant this Court's review.

Therefore, for all of these reasons, the Petition should be denied.

Respectfully submitted,

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